

FACB BHD*a***v.****HO SEE SIN & ORS**

HIGH COURT MALAYA, KUALA LUMPUR

b

MOHD GHAZALI YUSOFF J

[SUIT NO: D1-22-379-1998]

20 JUNE 2003

CONTRACT: Variation - Oral variation - Whether all parties involved must confirm variation - Stakeholder's duties

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EVIDENCE: Expert evidence - Relationship - Active participation as caller's proxy - Independence - Objective, unbiased opinion

Pursuant to a sale and purchase agreement dated 8 February 1994 ('SPA'), the plaintiff purchased some FTT shares from the 1st defendant. On the same date, the plaintiff and the 1st defendant also entered into a profit-guarantee agreement ('PGA') whereby the latter guaranteed that the total aggregated pre-tax profit earned or to be earned by FTT shall in aggregate not be less than RM5,040,000 for three consecutive financial years. As security for the profit guarantee, under cl. 3 PGA, the 1st defendant was to deliver an irrevocable letter of credit to the plaintiff. However, the plaintiff claimed that there was an oral variation to the form of security for the profit guarantee. The security now took the form of a sum of RM1,680,000 held by the 2nd defendant as stakeholder. At the material time, the solicitor for the plaintiff was the 2nd defendant. The 1st defendant subsequently appointed the 3rd defendant in place of the 2nd defendant.

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The plaintiff then sued the 1st defendant for the alleged shortfall between the pre-tax profit of FTT guaranteed by the 1st defendant and the actual pre-tax profit of FTT for the said three consecutive years. As against the 2nd defendant, the plaintiff claimed that it had breached its stakeholding duties by releasing RM1,680,000 to the 3rd defendant. While against the 3rd defendant, the plaintiff claimed the sum of RM1,680,000.

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The issues before the court were (1) whether there was an oral variation; (2) whether pre-tax profit must be construed to mean the pre-tax profit as per the audited accounts; and (3) whether the plaintiff was entitled to the sum of RM1,680,000 held by the 3rd defendant as a stakeholder.

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a Held:

- [1]** In order to establish an oral variation, all the three parties involved, *ie*, the plaintiff, the 1st defendant and the 2nd defendant must confirm the oral variation.
- b [2]** There was an oral variation to the form of security for the profit guarantee, and the issue was now not disputed by the 1st defendant who was a party to the SPA and the PGA. The 2nd defendant was not a party or privy to the transaction between the plaintiff and the 1st defendant and furthermore, had been discharged as solicitors by the defendant prior to the filling of this suit.
- c [3]** The determination of whether FTT was able to achieve the total aggregated pre-tax profit for the three financial years would solely depend on the audited accounts of FTT. The evidence clearly showed that FTT failed to achieve the total aggregated pre-tax profit of RM5,040,000 for the said three financial years.
- d [4]** The court was of the view that SD3, the expert witness called by the 1st defendant, did not present any expert evidence. He did not provide independent assistance to the court by way of objective, unbiased opinion in relation to the matters within his expertise. Moreover, the court was of the view that his active participation as the 1st defendant's proxy in annual general meetings of FTT would denote that there was a relationship between he and the 1st defendant and, as such, his independence ought to be suspected.
- e [5]** The 2nd defendant breached its stakeholding duties when it released the money to the 3rd defendant without first obtaining the consent of the plaintiff.
- f [6]** The 3rd defendant was not in a position to accept the said sum of RM1,680,000 as stakeholder without first obtaining the consent of the plaintiff to do so.
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[Judgment for the plaintiff; 1st defendant's counter-claim dismissed.]

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Case(s) referred to:

Almalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Bhd [1982] QB 84 (**refd**)

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC (**refd**)

Carron Co v. Hunter [1868] GM (HL) 106 (**refd**)

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA (**refd**)

Liverpool Roman Catholic Archdiocesan Trustees Inc v. Goldberg (No 3) [2001] 1 WLR 2337 (**refd**)

National Justice Compania SA v. Prudential Assurance Co Ltd (The "Ikarian Reefer") [1993] Vol 2 Lloyd's Law Report 68 (**refd**)

Toh Theam Hock v. Kemajuan Perwira Management Corporation Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC (**refd**)

Legislation referred to:

Companies Act 1965, ss. 167(1), 169(1), (4), (5), (6)(i), 181

For the plaintiff - N Chandran (SS Tieh); M/s Paul Ong & Assoc

For the 1st defendant - HY Chong (S Selvaratnam); M/s Azman Davidson & Co

For the 2nd defendant - P Jeyakumar; M/s Zahir Jeya & Zainal

For the 3rd defendant - Leong Wai Hong (Claudia Cheah); M/s Skrine

Reported by Izzaty Izzuddin

JUDGMENT**Mohd Ghazali Yusoff J:**

The plaintiff, a locally incorporated company filed this action against the 1st defendant, an individual and the 2nd and 3rd defendants which are legal firms. At the material time, the 2nd defendant were acting as solicitors for the 1st defendant. The 1st defendant subsequently appointed the 3rd defendant to act for him.

Background

The dispute between the plaintiff and the defendants revolves around a company named First Travel & Tours (M) Sdn Bhd ("FTT"). At the material time, FTT had an authorised share capital of RM300,000 divided into 300,000 ordinary shares of RM1 each which had been issued and fully paid-up and/or credited as fully paid-up. The 1st defendant, a director of FTT, was the registered and beneficial owner of 210,000 shares in FIT ("the said shares").

On 8 February 1994, four agreements were entered into between the plaintiff and the 1st defendant, namely:

- a* (a) a sale and purchase agreement of the said shares;
- (b) a profit guarantee agreement;
- (c) a shareholders agreement; and
- b* (d) an employment agreement.

Only the sale and purchase agreement and the profit guarantee agreement are relevant for the purpose of this suit.

The Sale And Purchase Agreement

- c* *Vide* the sale and purchase agreement (“SPA”), the 1st defendant agreed to sell and the plaintiff agreed to buy the said shares. The terms and conditions of the SPA included the following:
 - (a) Clause 3 provides the purchase consideration for the said shares shall be RM3,380,000 (“the purchase price”) to be satisfied in the following manner:
 - d* (i) on or before the execution of the SPA, the plaintiff shall pay to the 2nd defendant to hold as stakeholder a sum of RM150,000 as deposit and part payment for the said shares (“the deposit”);
 - e* (ii) the balance of the purchase price amounting to RM3,230,000 (“the balance purchase price”) shall be paid by the plaintiff to the 1st defendant on or before the completion date as defined in cl. 6.
 - (b) Clause 4 provides the purchase of the said shares is conditional upon, *inter alia*, the following condition precedent being satisfied, namely, upon execution of the SPA the 1st defendant shall deliver to the plaintiff’s solicitors to hold as stakeholder the share transfer forms duly executed by the 1st defendant and a copy of the resolution certified by the secretary or a director of FTT as a true copy of such resolution of its board of directors approving the sale and transfer of the said shares to the plaintiff or its nominees together with all the relevant share certificates.
 - f* (c) Clause 6 provides the completion of the SPA shall take place at the office of FTT within seven days from satisfaction of the conditions precedent, viz., on the completion date the following transactions, *inter alia*, shall take place:
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- (i) the 2nd defendant shall release the deposit together with all interest accrued thereto to the 1st defendant and/or his nominee; a
- (ii) the plaintiff shall pay the balance purchase price to the 1st defendant and/or his nominee;
- (iii) the 1st defendant shall deliver to the plaintiff the profit guarantee given by him in the manner as contained in cl. 7. b
- (d) Clause 7 which deals with the profit guarantee provides on the completion date, the 1st defendant shall guarantee that the total aggregated profit to be earned by FTT shall not be less than RM5,040,000 before tax for the 3 consecutive financial years of FTT from 1 April 1994 to 31 March 1995, 1 April 1995 to 31 March 1996 and 1 April 1996 to 31 March 1997 (“the said three financial years”) byway of an unconditional and irrevocable revolving letter of credit or an unconditional and irrevocable bank guarantee on terms and conditions acceptable to the plaintiff (“the profit guarantee”) for the sum of not less than RM1,680,000 per annum for each of the said three financial years provided always that the plaintiff shall not make any claim on the profit guarantee except at the end of 31 March 1997. c
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The Profit Guarantee Agreement

The salient provisions of the profit guarantee agreement (“PGA”) are as follows: e

- (a) *Vide* cl. 2 the 1st defendant guarantees that the total aggregated pre-tax profit earned and/or to be earned by FTT shall in aggregate not be less than RM5,040,000 for the three consecutive financial years of FTT ending on 31 March 1995, 31 March 1996 and 31 March 1997, ie, the said three financial years. f
- (b) Clause 3 provides as security for the profit guarantee, on the completion date the 1st defendant shall deliver or cause to be delivered to the plaintiff an irrevocable letter of undertaking from a licensed financial institution addressed to the plaintiff wherein the 1st defendant’s financier undertakes to issue in favour of the plaintiff or its nominee an unconditional irrevocable revolving letter of credit or bank guarantee for the sum of not less than RM1,680,000 per annum for each of the financial years referred to in cl. 2 and on other terms and conditions acceptable to the plaintiff within seven days from the date of payment of the balance purchase price to the 1st defendant (“the letter of credit”) provided always that the plaintiff shall call upon the profit guarantee only at the end of 31 March 1997 whereby the plaintiff shall then draw on the letter of credit to cover the difference, if any, between the said sum of RM5,040,000 and the actual pre-tax profit earned by FTT for the said three financial years. g
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- a* (c) Clause 6.1 provides in so far as the provisions contradict any of the terms and conditions of the SPA and/or the services/employment contract, if any, the provisions of the PGA shall prevail.

b The said shares were consequently transferred to the plaintiff from the 1st defendant. It is the plaintiff's case that subsequent to the execution of the SPA and the PGA, there was an oral variation to the form of security for the profit guarantee. The said variation came about due to the inability of the 1st defendant to comply fully with cl. 3 of the PGA. The security for the profit guarantee then took the form of a sum of RM1,680,000 held by the 2nd defendant as stakeholder.

c The plaintiff is now suing the 1st defendant for alleged shortfall between the pre-tax profit of FTT guaranteed by the 1st defendant and the actual pre-tax profit of FTT for the said three financial years. The shortfall, according to the plaintiff, is RM1,741,262.

d The plaintiff, *vide* this suit, seeks to enforce the guarantee given by the 1st defendant in cl. 7 of the SPA and cl. 2 of the PGA, namely:

e (i) as against the 1st defendant, the plaintiff claims the sum of RM61,262 being the difference between the shortfall amounting to RM1,741,262 and the said sum of RM1,680,000 held by the 2nd defendant as stakeholder, with interest and costs;

f (ii) as against the 2nd defendant, the plaintiff claims the said sum of RM1,680,000 held by the latter as stakeholder with interest and costs; the plaintiff has also alleged that the 2nd defendant has breached its stakeholding duties by releasing the said sum of RM1,680,000 to the 3rd defendant;

(iii) as against the 3rd defendant, the plaintiff claims the said sum of RM1,680,000 with interest and costs.

g The 1st defendant disputes the plaintiff's claim and has counter-claimed for, *inter alia*, the following:

h (i) a declaration that the plaintiff cannot enforce the profit guarantee due to non-compliance of the terms and conditions under the SPA, PGA and the other two agreements;

(ii) a declaration that the 1st defendant is entitled to the said sum of RM1,680,000 held by the 2nd defendant and later, the 3rd defendant as stakeholder;

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in the alternative:

(iii) an order that the total aggregated pre-tax profit earned and/or to be earned by FTT shall be determined by an independent audit;

(iv) an order directing the 3rd defendant to release the said sum of of RM1,680,000 to the 1st defendant.

The Agreed Facts

As between the plaintiff and the 1st defendant, the following are agreed facts:

(1) *Vide* the SPA dated 8 February 1994 the 1st defendant agreed to sell and the plaintiff agreed to purchase the said shares on the terms and conditions as set out therein.

(2) For the purpose of fulfilling cl. 7 of the SPA, the plaintiff and the 1st defendant executed the PGA dated 8 February 1994 whereby the 1st defendant covenanted that the total aggregated pre-tax profit earned and/or to be earned by FTT for the said three financial years will not be less than RM5,040,000.

(3) The accounts of FTT for the said three financial years were caused to be audited by Messrs T.H. Liew & Gan, a firm of public accountants.

(4) The said audited accounts were approved by the board of directors of FTT and the shareholders of FTT at the annual general meetings of FTT for the years 1995, 1996 and 1997.

(5) Demands had been cause to be made on the plaintiff's behalf on the defendants for payment of the sum of RM61,262 against the 1st defendant and the said sum of RM1,680,000 as against both the 2nd and 3rd defendants, respectively.

(6) The said sum of RM1,680,000 is now in the possession of the 3rd defendant, placed in a fixed deposit to earn interest.

As between the plaintiff and all the defendants, the following are agreed facts:

(1) The 3rd defendant holds the said sum of RM1,680,000 as stakeholder.

(2) There are competing claims by the plaintiff and the 1st defendant for the said sum of RM1,680,000.

(3) The 3rd defendant will pay the said sum of RM1,680,000 to whichever party as directed by the court.

- a* It is my view that the issues which need to be determined by the court in this dispute are as follows:
- (a) whether the plaintiff has proved that there was an oral variation to the form of security for the profit guarantee;
- b* (b) whether for the purpose of cl. 7 of the SPA and cl. 2 of the PGA, pre-tax profit earned and/or to be earned must be construed to mean the pre-tax profit as revealed in the audited accounts of FTT for the said three financial years; and
- c* (c) whether the plaintiff is entitled to the said sum of RM1,680,000, currently held by the 3rd defendant as stakeholder.

The First Issue – Whether There Was An Oral Variation To The Form Of Security For The Profit Guarantee

- d* What is clear is that the 1st defendant had given the guarantee. This is not disputed. What is also clear and not disputed is that the 1st defendant did not comply fully with cl. 3 of the PGA, viz., up to-date the 1st defendant has not, as security for the profit guarantee, delivered or cause to be delivered to the plaintiff an irrevocable letter of undertaking from a licensed financial institution addressed to the plaintiff wherein the 1st defendant's financier undertakes to
- e* issue, in favour of the plaintiff, an unconditional irrevocable revolving letter of credit or bank guarantee for the sum of not less than RM1,680,000 per annum for each of the said three financial years. This would need to have been done within seven days from the completion date, ie, the date when the plaintiff pays the balance purchase price of RM3,230,000 for the said shares to the
- f* 1st defendant.

- g* It is the plaintiff's case that as a consequence of this omission or failure on the part of the 1st defendant to deliver the said letter of undertaking referred to in cl. 3 of the PGA, there was a variation to the form of the security for the profit guarantee. Pursuant to a series of exchange of correspondence between the plaintiff's solicitors and the 2nd defendant as the then solicitors for the 1st defendant, the security for the profit guarantee took the form of the said sum of RM1,680,000 held then by the 2nd defendant. The conditions to enable the plaintiff to call upon the security for the profit guarantee remained. The letters in question which led to the variation to the form of the security for the profit guarantee are as follows:
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- (a) letter dated 11 May 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P10), where the balance purchase price of RM3,230,000 was sent and paid to the 2nd defendant as stakeholder and only to be released to the 1st defendant upon full compliance of cl. 6 of the SPA;
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- (b) letter dated 20 May 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P12), where it was agreed that out of the balance purchase price which was paid to the 2nd defendant, a sum of RM1,700,000 was to be released to the 1st defendant and that the balance of RM1,680,000 be held by the 2nd defendant as stakeholder, pending further instructions from the plaintiff; this letter was pursuant to a telephone conversation between one Kenny Ng (SP3), the plaintiff's solicitor, and one Poh Fook Yuen, a solicitor with the 2nd defendant, and it reads:

We refer to the telephone exchanges between your Mr Poh Fook Yuen and our Mr Kenny Ng this morning pertaining to the above.

We confirm that our client has consented to you releasing to your client the sum of RM1,700,000.00 out of the Purchase Price that has been remitted to you. As for the balance of RM1,680,000.00, kindly continue to hold it as stakeholders pending further instructions from our client.

Please note that the aforesaid arrangements shall be without prejudice to our client's rights as contained in all the abovementioned agreements.

- (c) letter dated 27 May 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P13), which reads:

We refer to our letter of 24th May 1994 to you pertaining to the above.

Further to our said letter of 24th May 1994, please be informed that our client has agreed to accept as security the sum of RM1,680,000.00 to be remitted by you to us to be placed by us as stakeholders in a fixed deposit account (instead of the Letter of Credit or Bank Guarantee as stipulated in Clause 3.1 of the Profit Guarantee Agreement) to be called on demand by our Client pursuant to the terms and conditions as contained in the Profit Guarantee Agreement.

This arrangement is on the basis that it shall be without prejudice to our client's all other rights as contained in the Profit Guarantee Agreement and Sale and Purchase Agreement.

Kindly therefore remit us your cheque for the said sum of RM1,680,000.00 on or by the 30th May 1994.

the plaintiff pointed out that the 2nd defendant never disputed the contents of this letter at the material time;

- (d) letter dated 30 May 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P14), which reads:

- a* We refer to our letter of 27th day of May 1994 to you and the telephone exchanges between your Mr Poh Fook Yuen and our Mr Kenny Ng today pertaining to the above.
- As discussed, we are given to understand that you shall remit to us your cheque for the sum of RM1,680,000.00 in a day's time or two.
- b* Kindly attend to the needful at your soonest.
- (e) letters dated 6 June 1994 and 20 June 1994 from the plaintiff's solicitors to the 2nd defendant (exhs. P15 and P16 respectively), still requesting the 2nd defendant to remit the said sum of RM1,680,000;
- c* (f) letter dated 5 July 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P17), which reads:
- We refer to the meeting at First Travel & Tours Sdn Bhd on the 1st day of July 1994 pertaining to the above.
- d* As discussed, we are to confirm the following:
1. (a) Your client shall furnish a bank guarantee for the sum of RM1,680,000.00 only per annum for each of the three (3) consecutive years of First Travel & Tours Sdn Bhd from the 1/4/94 to the 31/3/95, from the 1/4/95 to the 31/3/96 and from the 1/4/96 to 31/3/97 to be delivered to us or to our client directly by the end of this month;
 - e* (b) Meanwhile, please be reminded that you are to continue to hold as stakeholder the sum of RM1,680,000.00 currently held by you, and only to release the said sum directly to your client's bank to secure the said bank guarantee in return. We shall furnish you shortly in due course a sample of the format and wording of the bank guarantee for the bank's adoption; and
 - f* 2. In the meantime, you are also to secure from your client the remaining documents as stipulated in Clause 6.2.2 of the said Sale and Purchase Agreement dated 8th day of February 1994 to be transmitted to us by
 - g* the 15th day of July 1994.
- Please note that the aforesaid arrangements shall be without prejudice to all our client's rights as contained in the said Sale and Purchase Agreement and the Profit Guarantee Agreement both dated the 8th day of February 1994, and shall not be construed in any way as a variation and waiver of any of the terms and conditions contained therein.
- h* Your immediate attention and co-operation would be much appreciated.
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- (g) letter dated 28 February 1995 from the plaintiff's solicitors to the 2nd defendant (exh. P18), where the plaintiff's solicitors asked the 2nd defendant for confirmation that the 2nd defendant was still holding the said sum of RM1,680,000 as stakeholder; and *a*
- (h) letter dated 15 January 1996 from the 2nd defendant to the plaintiff's solicitors (exh. P19), confirming that the 2nd defendant was still holding the said sum of money as stakeholder. *b*

It is the plaintiff's contention that based on the contents of these letters, it is undisputed that:

- (i) the form of security as envisaged in cl. 3 of the PGA is now in the form of a sum of RM1,680,000 then held by the 2nd defendant pursuant to the terms and conditions of the SPA and the PGA; *c*
- (ii) the plaintiff has never waived the profit guarantee or the requirement of a security for the profit guarantee; and *d*
- (iii) the plaintiff pursuant to cl. 3 of the PGA could still call upon the security for the profit guarantee, in the event FTT fail to meet its total aggregated pre-tax profit of RM5,040,000 for the said three financial years.

In his written submission, counsel for the 1st defendant did not seem to have dealt with this issue at length, viz., as to whether there was an oral variation to the form of security for the profit guarantee. When the matter came up for oral submissions, counsel for the 1st defendant announced that the said variation was not disputed. *e*

At the trial, although the 2nd defendant did not call any witness to the stand, their counsel surprisingly dealt with this issue at length in his written submission. He pointed out that the 2nd defendant was only engaged to represent the 1st defendant in the SPA. Notwithstanding that stance, in relation to the profit guarantee, he insisted that a dispute arose as to the form and manner of the bank guarantee and negotiations continued between the parties which remained unresolved. I must mention here that there is no specific evidence that there was such a dispute. *f*

Counsel for the 2nd defendant then contended there was no oral variation of the SPA and PGA as averred by the plaintiff. He also insisted that the 2nd defendant was not in breach of stakeholding duties allegedly to the plaintiff. Further, the plaintiff did not suffer any loss by the action of the 2nd defendant releasing the said sum of RM1,680,000 to the 3rd defendant. That being the position, he contended that the plaintiff's claim against the 2nd defendant was *g*

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a unsustainable and misconceived. I must point out here that the plaintiff has not prayed, as against the 2nd defendant, for any damages pertaining to the alleged breach of stakeholding duties.

b Counsel argued the plaintiff had failed to prove that there was an oral variation to the terms and conditions of the SPA and PGA. The 2nd defendant's holding of the said sum of RM1,680,000 to secure the bank guarantee was different from the imposition of a duty upon the 2nd defendant to hold the same in lieu of the 1st defendant furnishing a bank guarantee. At all times, the 1st defendant was required to provide the said sum of RM1,680,000 to secure the bank guarantee pursuant to the PGA and never once did the parties waive this requirement. The requirement or obligation was totally different from what was alleged by the plaintiff, ie, that the said sum of RM1,680,000 was to be held by the 2nd defendant in lieu of the bank guarantee, which was apparently an oral variation of the PGA. This was denied. In order to establish the oral variation, all three parties involved, ie, the plaintiff and the 1st and 2nd defendants should confirm the oral variation. The 2nd defendant then denied ever receiving any instructions concerning the same from the 1st defendant.

e Counsel further submitted there never was a stakeholding term imposed on the 2nd defendant to hold the said sum of RM1,680,000 in lieu of the 1st defendant's obligation to furnish the bank guarantee. No documentary evidence has been provided to confirm the suggested variation to the stakeholding agreement. The balance purchase price was not required to be paid to the 2nd defendant directly but was nevertheless paid. There was no stakeholding duty imposed for the balance purchase price under the SPA. The 2nd defendant held the balance purchase price due to the 1st defendant for the benefit of the latter, and was to be released to the same upon completion of the SPA. As such, the stakeholder arrangement is denied in the circumstances.

f Furthermore, there was no obligation on the part of the 2nd defendant to release the said sum of RM1,680,000 to the plaintiff upon demand because the plaintiff had failed to establish that the said sum should be released to the plaintiff on their mere allegation of a shortfall of profits guaranteed. Anyway, the 2nd defendant was discharged by the 1st defendant. The 2nd defendant then referred to a letter dated 9 January 1998 from the 3rd defendant to the plaintiff's solicitors (exh. D37), which reads:

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Dear Sirs,

1. Profit Guarantee dated 8.2.1994 between FACB Berhad and Ho See Sin

2. Sale & Purchase Agreement dated 8.2.94 between FACB Berhad and Ho See Sin

We refer to the above matter.

We wish to advise that upon the request of Halim Ismail & Company and Mr Ho See Sin, Halim Ismail & Company have forwarded to us as the present Solicitors of Mr Ho the sum of RM1,680,000.00. We hereby undertake with you and Mr Ho that we will deal with the said sum subject to the same terms and conditions as under which Halim Ismail & Company have held the sum.

The 2nd defendant emphasized they never released the monies to the 1st defendant but to the 3rd defendant who stepped into their shoes and undertook to carry out the same duties and responsibilities of the 2nd defendant, as if they were still retained.

Counsel for the 3rd defendant did not canvass any submission on this issue.

Finding Of The Court On The First Issue

It is not disputed that the 1st defendant did not fully comply with cl. 6 of the SPA, viz., he did not deliver to the plaintiff the profit guarantee given by him in the manner as contained in cl. 7 of the SPA. The letters introduced by the plaintiff, discussed above, showed that by letter dated 11 May 1994 (exh. P10), the plaintiff's solicitors sent the balance purchase price for the said shares, amounting to RM3,230,000, to the 2nd defendant to hold as stakeholder, instead of paying it directly to the 1st defendant as provided for in cl. 6 of the SPA, with the request that the monies were only to be released to the 1st defendant upon full compliance of cl. 6 of the SPA, viz., the monies can be released to the 1st defendant when the latter delivers the profit guarantee given by him in the manner as contained in cl. 7 of the SPA.

A following letter from the plaintiff's solicitors to the 2nd defendant (exh. P12) referred to a conversation between their goodselves wherein the plaintiff's solicitors confirmed that the plaintiff has consented to the 2nd defendant releasing a sum of RM1,700,000 out of the balance purchase price of RM3,230,000 to the 1st defendant. As for the balance of RM1,680,000, the plaintiff's solicitors requested the 2nd defendant to "kindly continue to hold it as stakeholders pending further instructions" from the plaintiff.

- a* In a following letter from the plaintiffs solicitors to the 2nd defendant (exh. P13), the former informed the latter that the plaintiff “has agreed to accept as security the sum of RM1,680,000 to be remitted by you to us to be placed by us as stakeholders in a fixed deposit account (instead of the letter of credit or bank guarantee as stipulated in cl. 3.1 of the Profit Guarantee Agreement) to be called on demand by our client pursuant to the terms and conditions as contained in the Profit Guarantee Agreement”.

- c* From my reading of the above letter (exh. P13), I am of the view that those words denote that the plaintiff had sought to vary the security for the profit guarantee. This clearly lend support to the plaintiff’s stand that there was an oral variation to the form of security to the profit guarantee. Anyway, as mentioned earlier, counsel for the 1st defendant informed the court that the 1st defendant was no longer disputing the said variation.

- d* The evidence itself did not show that the 2nd defendant, as solicitors for the 1st defendant, objected to the said variation. Counsel for the 2nd defendant however insisted that the 2nd defendant did not receive any instructions from the 1st defendant concerning the said variation. This, to me, would be tantamount to giving evidence from the bar table as no representative of the 2nd defendant came into the witness box to give evidence to this effect. Counsel for the 2nd defendant then argued there never was a stakeholding term imposed on the 2nd defendant to hold the said sum of RM1,680,000 in lieu of the 1st defendant’s obligation to furnish the bank guarantee and no documentary evidence has been provided to confirm the suggested variation to the stakeholding agreement. With due respect to counsel for the 2nd defendant, the series of correspondence discussed above seem to suggest otherwise. I am of the view that his stand, that there was no stakeholder agreement and that he never received instructions from the 1st defendant concerning the oral variation in the form of security to the profit guarantee, is totally unacceptable. If what he contended is the true situation, I would have at least expected the 2nd defendant to respond to the series of letters from the plaintiff’s solicitors by screaming blue murder at the latter and conveying his objections in writing that what was stated in those letters was not the actual situation as far as the 2nd defendant and his client, ie, the 1st defendant are concerned. Instead, in a letter dated 15 January 1996 to the plaintiff’s solicitors (exh. P19), the 2nd defendant confirmed that they were still holding the said sum of RM1,680,000 as stakeholder.

- i* In his submission, counsel for the 2nd plaintiff pointed out that the approval of the Foreign Investment Committee had to be obtained before the SPA and the PGA could be varied. I cannot see how this can be raised as an issue when it never formed part of the pleadings.

Looking at the above circumstances and the evidence before me, I am of the view that the 2nd defendant had taken instructions from the 1st defendant as to the said variation. The letter dated 5 July 1994 from the plaintiff's solicitors to the 2nd defendant (exh. P17) clearly confirmed that, arising from a meeting of the parties at the office of FTT on 1 July 1994, the plaintiff and the 2nd defendant with the agreement of the 1st defendant, agreed that the 2nd defendant shall continue to hold as stakeholder the said sum of RM1,680,000, pending the delivery of the bank guarantee by the 1st defendant before the end of July 1994. It was also specifically stated therein that the said sum of RM1,680,000 could only be released directly to the 1st defendant upon delivery of the bank guarantee. Be that as it may, I would have thought that since counsel for the 1st defendant had announced albeit late in the day that the said variation was not disputed, the 2nd defendant would have dropped this part of his submission as it has now ceased to be an issue.

In conclusion, I am in agreement with the submission of the plaintiff that based on the contents of the above letters, the form of security as envisaged in cl. 3 of the PGA is now in the form of the said sum of RM1,680,000 which, at the material time, was held by the 2nd defendant pursuant to the terms of the SPA and the PGA. I cannot see how the contention of the 2nd defendant in relation to this issue can stand. There was an oral variation to the form of security for the profit guarantee and this is now not disputed by the 1st defendant who is a party to the SPA and the PGA. The 2nd defendant was not a party or privy to the transaction between the plaintiff and the 1st defendant and furthermore, had been discharged as solicitors by the 1st defendant prior to the filing of this suit.

The Second Issue – Whether For The Purpose Of Clause 7 Of The SPA And Clause 2 Of The PGA, Pre-tax Profit Earned And/Or To Be Earned Must Be Construed To Mean The Pre-tax Profit As Revealed In The Audited Accounts Of FTT For The Said Three Financial Years

On this issue, it was the contention of the plaintiff that the determination of whether FTT was able to achieve the total aggregated pre-tax profit of RM5,040,000 for the said three financial years would solely depend on the audited accounts. It was not disputed that the audited accounts for the said three financial years were audited in accordance with the approved accounting standards and the 9th Schedule of the Companies Act 1965 ("the Act"). Counsel for the plaintiff contended that since the audited accounts had been accepted and properly prepared, the plaintiff need only show that the aggregated pre-tax profit of FTT for the said three financial years were not met. The plaintiff had adduced the contents of the audited accounts for the said three financial years which showed the following:

- a* (a) the pre-tax profit for the year ending 31 March 1995 was RM1,521,496;
(b) the pre-tax profit for the year ending 31 March 1996 was RM768,411;
(c) the pre-tax profit for the year ending 31 March 1997 was RM566,875.
- b* The plaintiff contended that FTT failed to achieve the total aggregated pre-tax profit of RM5,040,000 for the said three financial years. Considering the plaintiff's shareholding of 70% in FTT, the shortfall to be recovered by the plaintiff was RM1,741,262. In view of this shortfall and the failure of the 1st defendant to fulfill his guarantee under cl. 2 of the PGA read together with
- c* cl. 7 of the SPA, the plaintiff was entitled to call on the security for the profit guarantee, ie, the said sum of RM1,680,000.

Counsel for the 1st defendant dealt at length with this issue. He canvassed the following arguments:

- d* (a) the plaintiff was not entitled to determine what was the pre-tax profit of FTT for the profit guarantee by employing the audited accounts of FTT; and
(b) it was implied in the PGA that pre-tax profit of FTT for the profit guarantee purpose could only be determined by an independent accountant specifically appointed for that purpose.
- e*

- Counsel argued that since the plaintiff was the party seeking to enforce the profit guarantee by relying on the audited accounts of FTT, the burden was on the plaintiff to prove that for the purpose of cl. 2 of the PGA, "pre-tax profit earned and/or to be earned" must be construed to mean the pre-tax profit as revealed in the audited accounts for the said three financial years. What was meant by "pre-tax profit earned and/or to be earned" is a matter of construction of the contract. The plaintiff did not offer any evidence to prove why "pre-tax profit earned and/or to be earned" must mean pre-tax profit in the audited accounts. Instead, the plaintiff had merely made an assumption that it was so. It was clear from the plaintiff's witnesses that the audited accounts for the said three financial years were not prepared nor audited with the specific purpose of determining "pre-tax profit earned and/or to be earned". The plaintiff's action against all the defendants must fail in limine and be dismissed because the plaintiff had failed to discharge their burden of proof to show that
- f* "pre-tax profit earned and/or to be earned" meant the pre-tax profits in the audited accounts for the said three financial years. The audited accounts could not therefore be accepted automatically as evidence of shortfall. The method of determining pre-tax profit for the profit guarantee employed by the plaintiff, viz., the use of audited accounts was not the method intended to be used by
- g*
- h*
- i* the parties under the PGA for the following reasons:

- (a) “audited accounts” merely meant the auditor has certified that the accounts of FTT have been prepared in accordance with the requirements of s. 169 and the 9th Schedule of the Act; *a*
- (b) it was never the 1st defendant’s case to challenge the audited accounts concerned in relation to their liability for the purpose for which they were originally prepared, ie, for the purpose of complying with the Act; *b*
- (c) the 1st defendant’s challenge was with respect to the plaintiff’s interpretation of cl. 2 of the PGA and its use of the audited accounts for the purpose of the profit guarantee; this does not mean that the auditor’s opinion about the compliance with the Act was being challenged; *c*
- (d) as to the determination of what constituted “profit” of a business is a subjective exercise; it was submitted that:
- (i) what was “profit” of a company may differ depending on the purpose for which the determination is made, eg, what is profit for the purpose of disclosure under the requirements of the Act need not necessarily be accepted as profit for income tax purposes; *d*
- (ii) this could be seen from the notes to the audited accounts where it was stated that FTT had paid a “disproportionate taxation ... due to certain expenses being disallowed for taxation purposes”; *e*
- (iii) this suggested that profit for taxation purpose was not the same as shown in the audited accounts;
- (iv) by the same argument there was no reason why “pre-tax profit” for the purpose of cl. 2 of the PGA must necessarily be the same as pre-tax profit as revealed in the audited accounts; *f*
- (v) as pre-tax profit of the company could vary, depending on the purpose for which the determination is made, it was submitted that there was nothing in the plaintiff’s case to prove that the pre-tax profit earned and/or to be earned for the profit guarantee purpose must necessarily be found in the audited accounts; without proof in the affirmative by the plaintiff that its method was the only method, it could equally be possible that the parties have intended that pre-tax profit as determined by the Inland Revenue department be used as basis for determining pre-tax profit for cl. 2 of the PGA. *g*

*h**i*

- a** Counsel for the 1st defendant argued as this case involved construction of contract, it was submitted that the following rules of construction applies:
- (a) the court must ascertain what the mutual intentions of the parties were as to the obligations each assumed by the contractual words in which they sought to express them;
- b**
- (b) the court is not concerned with the actual intention of the parties but what the intention of a reasonable person would be if placed in the situation of the parties ('presumed intention');
- c**
- (c) the intention of the parties must be ascertained from the words used in the contract;
 - (d) the court is entitled to look at the evidence of the objective factual background known to the parties (factual matrix) at or before the date of the contract;
- d**
- (e) if there is ambiguity, the court may imply a term into the contract;
 - (f) the court must give effect to all parts of the contract where possible and no part of it should be treated as inoperative or surplus.
- e** (See *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23)
- Counsel then argued the following reasons support the 1st defendant's contention why, as matter of construction of contract, it was not the intention of the parties to use the audited accounts to determine the pre-tax profit under cl. 2 of the PGA:
- f**
- (a) the words "earned and/or to be earned" were repeatedly used in the PGA indicating that the guarantee given by the 1st defendant was in respect of "profit earned" as well as "profit to be earned";
- g**
- (b) by virtue of the juxtaposition of "earned" with "to be earned" in the PGA the parties clearly agreed that what was considered pre-tax profit for the purpose of the profit guarantee should include not only pre-tax profit actually received in the years ended 31 March 1995, 31 March 1996 and 31 March 1997 but also pre-tax profit which, arising from the business activities in those years, was going to be received in the future;
- h**
- (c) thus the plaintiff and the 1st defendant for whatever reasons had agreed that for the purpose of determining whether the profit guarantee had been met by the 1st defendant, future profits to be earned by FTT should be included in the calculation of pre-tax profit;
- i**

- (d) there were some differences in opinion between SP2, an officer of FTT at the material time, who was involved with the negotiations leading to the signing of the SPA, PGA and the other two agreements, and the 1st defendant about the meaning of “profit earned” and “profit to be earned”; it was submitted that the 1st defendant’s “version” should be accepted as he had long experience in the travel business and would have better understanding of how the income of FTT would be generated than SP2 who had admitted he had never worked in the travel business; *a*
- (e) the items of “pre-tax profit to be earned” would not have been taken into consideration in the preparation of the audited accounts for the said three financial years; *b*
- (f) in cross-examination, Goo Chee Hon (SP4), an ex-employee of the plaintiff, said the audited accounts were not prepared with the purpose of cl. 2 of the PGA in mind; *c*
- (g) the audited accounts could not be used for the profit guarantee purpose because “profit to be earned” was not specifically taken into account. *d*

Counsel for the 1st defendant further contended, notwithstanding the differences in opinion between the parties on the scope of “pre-tax profit earned and/or to be earned”, it was clear from the evidence of SP2 and the 1st defendant that both parties at least recognise that FTT was considered to have made profit for the purpose of the PGA, once sales of air tickets had been made although full payment for the same were yet to be received. This clearly suggested that, as far as determining what was pre-tax profit of FTT under cl. 2 of the PGA was concerned, the parties had agreed that collection of a debt was not an issue, since profit to be earned had already been recognised for the sales done within the profit guarantee period of 1 April 1994 to 31 March 1997. *e*

For the profit guarantee purpose, if the debts to FTT arose from sales done within the profit guarantee period, it was submitted that provisions for doubtful debts could not be made as these debts were considered profits to be earned. And if the doubtful debts arose from sale done before the profit guarantee period (ie, before 1 April 1994) it was submitted that provisions for doubtful debts could not be made against the profit of FTT “earned and/or to be earned” within the profit guarantee period as well because these sales arose from transactions done outside the profit guarantee period. *f*

When the SPA, PGA and the other two agreements were entered into on 8 February 1994, the financial year end of FTT was 31 December and not 31 March. The financial year end of FTT was changed from 31 December to 31 March pursuant to a board resolution passed on 20 February 1995, ie, the *g*

- a* change was made after the PGA was signed. It was submitted that it was not the intention of the parties to use the audited accounts to determine pre-tax profit for the purpose of cl. 2 of the PGA because the reference to years ended 31 March in the said clause could not possibly be to the financial year end of the audited accounts of FTT which at the time of the PGA was 31 December.
- b* Counsel pointed out it was common ground that the pre-tax profit figure in the audited accounts for year ended 31 March 1995 (exh. P1) was for a period of 15 months ie, from 1 January 1994 to 31 March 1995. However, the profit guarantee given for the year ended 31 March 1995, was for a 12 month period ie, from 1 April 1995 to 31 March 1995. Because the time frame for the
- c* audited accounts and the profit guarantee period do not match, it was submitted that this was another clear reason why the parties could not have intended the use of the audited accounts to determine pre-tax profit for the purpose of the profit guarantee. The plaintiff nevertheless claimed for the purpose of determining “pre-tax profit earned and/or to be earned” for the period between
- d* 1 April 1994 to 31 March 1995, it had pro-rated the pre-tax profit in the audited accounts (exh. P1) to obtain the figure of RM1,217,197. However the plaintiff failed to prove how, on the proper construction of cl. 2 of the PGA, apportionment of pre-tax profit was intended by the parties and not the more likely alternative of having the pre-tax profit of that 12 month period determined
- e* specifically. It was submitted that a reasonable person in the same situation would have intended that the pre-tax profit be determined specifically instead of doing an apportionment. As the plaintiff was seeking to enforce a guarantee, it had a strict obligation to prove what was the exact pre-tax profit of FTT over the profit guarantee period. This the plaintiff had not done by pro-rating the pre-tax profit figure found in exh. P1.
- f*
- The report introduced by Goh Joon Hai (SD3), whom the 1st defendant had called to give expert evidence, stated unequivocally that profit for the year stated in the audited accounts of FTT did not include profit to be earned because “profit to be earned is not permitted under the approved accounting standards”
- g* and was therefore excluded from audited accounts done for the purpose of the Act.
- Since it was not possible to use the audited accounts for the profit guarantee purpose, it was submitted that it was implied in the contract between the plaintiff and the 1st defendant that “pre-tax profit earned and/or to be earned”
- h* in cl. 2 of the PGA must be determined by an independent accountant specifically appointed for that purpose. Counsel submitted the court may imply a term into a contract where the terms of the contract are ambiguous on condition that:
- i*

- (a) it must be reasonable and equitable; *a*
- (b) it must be necessary to give business efficacy to the contract;
- (c) it must be so obvious that it goes without saying;
- (d) it must be capable of clear expression; *b*
- (e) it must not contradict any express term of the contract.

(See *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd, supra*)

Counsel for the 1st defendant argued it is clear from the evidence that the parties themselves had acted on this implied term that “pre-tax profit earned and/or to be earned” in cl. 2 of the PGA was to be determined by an independent accountant. To support this contention, counsel referred to the following letters and notes: *c*

- (a) a letter dated 2 April 1997 from the 1st defendant to the plaintiff (exh. D39), which reads: *d*

RE: MEETING ON 31 MARCH 1997

This short note is to record our discussion on 31 March 1997 around 12.00 hrs. at Karambunai Golf Management Conference Room. *e*

1. FACB Berhad will take over FTT’s management effective 1 May 1997.
2. FTT’s account for APR96/MAR97 ending 31 MAR’97 must be completed by 10 April 1997. *f*
3. FACB and FTT under Dato’ Ho See Sin management will each appoint an independent external Accounts firm to audit FTT’s accounts until 31 March 1997.
4. FACB will declare dividends for FTT’s financial years JAN94/MAR95/APRIL95/MAR96 and APR96/MAR97. *g*

the 1st defendant contended this letter confirmed the agreement between the plaintiff’s chief executive officer and the 1st defendant to “appoint an independent external accounts firm”;

- (b) a note dated 3 April 1997 from FACB to the 1st defendant (exh. D40), which reads: *h*

i

a **SUBJECT: EXPIRY OF EMPLOYMENT CONTRACT AND
PROFIT GUARANTEE**

This refers to our recent meeting pertaining the expiry of your employment contract and profit guarantee which will crystallize on 31 March 1997.

b As agreed, an independent and reputable accounting firm will be recommended by FACB through Daniel Kong to finalise the audit on FTT.

c FACB will take full charge of FTT's management effective 1 May 1997 and you shall remain as a minority shareholder.

Dividends for 1996 and 1997 will only be decided after the final audit.

In the meantime, please ensure a smooth handover of duties and responsibilities to Phillip Ng by 30 April 1997.

d Finally, FACB wishes you every success in your future endeavours.

counsel for the 1st defendant pointed out this note showed that "as agreed, an independent and reputable accounting firm will be recommended by FACB ... to finalise the audit on FTT";

e (c) a letter dated 23 April 1997 from the plaintiff to Messrs Coopers & Lybrand (exh. D41), requesting the firm to "review" the SPA, PGA and the other two agreements together with an independent legal firm "to determine the shortfall/surplus under the Profit Guarantee Agreement";

f (d) a letter dated 12 June 1997 from Messrs Coopers & Lybrand to the plaintiff (exh. D43), setting out their terms of engagement and fee basis for the assignment wherein the plaintiff accepted but with an amendment to the scope of work to include to present to the plaintiff a report upon completion of their review and to determine the shortfall/surplus from the profit guarantee agreement;

g (e) a letter dated 30 June 1997 from the plaintiff to Messrs Coopers & Lybrand (exh. D44), wherein the former enclosed a cheque for RM18,375 being upfront fee and 5% service tax for the latter to commence work; and

h (f) a letter dated 7 July 1997 from Messrs Allen & Gledhill to Messrs Coopers & Lybrand (exh. D42), giving their legal opinion on the PGA.

i

Counsel for the 1st defendant submitted these letters showed the parties had agreed to appoint Messrs Coopers & Lybrand to determine the pre-tax profit for the profit guarantee purpose. As can be seen, a 50% fee had already been paid. The plaintiff however did not pursue it further but chose instead to use the audited accounts for the profit guarantee purpose. The 1st defendant had protested against the use of the audited accounts for the profit guarantee purpose, but to no avail. It was submitted that the plaintiff had failed to comply with the implied term that pre-tax profit for the profit guarantee purpose should be determined by an independent accountant and as such the plaintiff was not entitled to enforce the PGA.

If the court disagreed that there is an implied term, it was submitted that the conduct of the plaintiff above gave rise to an estoppel by convention which prevented the plaintiff from going back on the interpretation the parties themselves had given to the PGA, ie, for the purpose of cl. 2 of the PGA, pre-tax profit of FTT should be determined by an independent accountant.

(See *Almalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84 and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283)

Counsel further contended even if the audited accounts could be used for the profit guarantee purpose, it was submitted that the provision for doubtful debts of RM1,096,789 made by the plaintiff in determining pre-tax profit for the profit guarantee purpose should be disregarded on the ground that the said provision was made with the *mala fide* intention of appropriating the sum of RM1,680,000 held by the 3rd defendant for its own use. The 1st defendant stressed that FTT had never made provisions for doubtful debts in the magnitude of millions of ringgit before. It was seriously doubtful that all of a sudden, an amount of RM1,096,789 could become bad or doubtful debts in the last year of the profit guarantee period. For the avoidance of doubt, the 1st defendant was not challenging the audited accounts but if it was used as the basis for a claim under the PGA, then the 1st defendant disagreed with the provision for doubtful debts therein.

Finding Of The Court On The Second Issue

Clause 1.1. of the SPA entitled "Interpretation" provides "profit" means "the aggregate of the pre-tax profit of the company" whereas cl. 1.1. of the PGA also entitled "interpretation" provides "profit" means "the pre-tax profit earned and to be earned by the company". Clause 7 of the SPA entitled "Profit Guarantee" reads:

- a* On the Completion Date, the Vendor shall guarantee that the total aggregated Profit to be earned by the Company shall not be less than Ringgit Malaysia Five Million and Forty Thousand (RM5,040,000.00) before tax for the three (3) consecutive years of the Company from 1st day of April 1994 to the 31st day of March 1995, the 1st day of April 1995 to the 31st day of March 1996 and the 1st day of April 1996 to the 31st day of March byway of an unconditional and irrevocable revolving Letter of Credit or an unconditional and irrevocable Bank Guarantee on terms and conditions acceptable to the Purchaser (hereinafter referred to as “the Profit Guarantee”) for the sum of not less than Ringgit Malaysia One Million Six Hundred and Eighty Thousand (RM 1,680,000.00) only per annum for each of the said years PROVIDED ALWAYS that the purchaser shall not make any claim on the Profit Guarantee except at the end of the 31st day of March 1997.

Clause 2 of the PGA entitled “The Profit Guarantee” reads:

- d* The Vendor hereby guarantees that the total aggregated pre-tax profit earned and/or to be earned by the Company shall in aggregate not be less than Ringgit Malaysia Five Million and Forty Thousand (RM5,040,000.00) only for the three (3) consecutive years of the Company ending on 31st day of March 1995, the 31st day of March 1996 and the 31st day of March 1997 (hereinafter referred to as “the Profit Guarantee”).

- e* The word “aggregate” is not defined in both the SPA and the PGA. According to the *Concise Oxford Dictionary* (9th edn), the word “aggregate” means “a collection of, or the total of, disparate elements”; “collect together; combine into a whole”.

- f* The issue which needs to be determined by the court is whether for the purpose of cl. 7 of the SPA “the total aggregated profit to be earned ... before tax” and “the total aggregated pre-tax profit earned and/or to be earned” for the purpose of cl. 2 of the PGA must be construed to mean the pre-tax profit as revealed in the audited accounts of FTT for the said three financial years. It was the plaintiff’s case that whether FTT was able to achieve the total aggregated pre-tax profit of RM5,040,000 would solely depend on the audited accounts. It was not disputed that the audited accounts of FTT for the said three financial years were audited and tabled at the respective annual general meetings of FTT. The audited accounts for the said three financial years showed the following:

- g*
- h* (a) The audited accounts for year ended 31 March 1995 (exh. P1), which were audited by Messrs T.H. Liew & Can, Public Accountants, showed that profit for the year before taxation was RM1,521,496. It was also stated therein under Note No. 18 to the accounts the following:

i

The financial statements for the year ended 31st December 1993 cover twelve months from 1st January to 31st December. Due to change in the financial year end, the financial statements for 31st March 1995 cover 15 months from 1st January 1994 to 31st March 1995.

a

It was also stated in the notes to the accounts that FTT had changed its financial year end from 31 December to 31 March. The accounts further showed that the 1st defendant was a director of FTT at that material time, and as at 31 March 1995 owned 50,000 shares. The 1st defendant signed the accounts, together with another director on behalf of the board of directors, in accordance with a resolution of the directors. The statutory declaration to the accounts by a director of FTT stating that to the best of his knowledge and belief, the accounts were correct, was made by the 1st defendant.

*b**c*

- (b) The audited accounts for year ended 31 March 1996 (exh. P2), which were audited by Messrs T.H. Liew & Can, Public Accountants, showed that profit for the year before taxation was RM768,411. The accounts further showed that the 1st defendant was a director of FTT at that material time, and as at 31 March 1996 owned 50,000 shares. The 1st defendant signed the accounts together with another director on behalf of the board of directors, in accordance with a resolution of the directors. The statutory declaration to the accounts by a director of FTT stating that to the best of his knowledge and belief the accounts were correct, was made by the 1st defendant.

*d**e*

- (c) The audited accounts for year ended 31 March 1997 (exh. P20), which were also audited by Messrs T.H. Liew & Can, Public Accountants, showed that profit for the year before taxation was RM566,875. The accounts further showed that at that material time the 1st defendant was a director of FTT and as at 31 March 1997 owned 50,000 shares. There is also a provision for doubtful debts amounting to RM1,096,789.

f

The evidence showed that at a meeting of the board of directors held on 23 September 1997, attended by four directors including the 1st defendant, a circular resolution pertaining to the provision of doubtful debts amounting to RM1,096,789 in FTT's accounts for the year ended 31 March 1997 was tabled for ratification by the board. In view of the 1st defendant's objection, the chairman called for the motion to be put to vote in accordance with the articles of association. The result of the vote was three directors voted for ratification whilst the 1st defendant voted against. The minutes of this director's meeting (exh. D48), under the heading "any other matters", reads as follows:

*g**h**i*

a **4.1. PROFIT GUARANTEE**

HSS (the 1st defendant) requested for an explanation for the delay in the disbursement of the Profit Guarantee to him as agreed in the Profit Guarantee Agreement signed between him and FACB Berhad (FACB) on 8 February 1994, as his contract expired on 31 March 1997.

b WHK replied that, in effect, the management of the Company was handed back to FACB on 1 May 1997, two months grace period from the date of the expiry of the contract. However the amount of the Profit Guarantee due to HSS had to be determined from the audited accounts for the years ended 31 March 1995, 1996 and 1997. He further stressed that this Board Meeting
c was convened to resolve matters pertaining to the 1997 accounts, to facilitate the speedy process of finalising the accounts for approval by the shareholders.

The minutes above revealed that the 1st defendant requested for an explanation as to why there was delay in the disbursement of the profit guarantee which, to me, simply meant he was questioning why the said sum of RM1,680,000,
d held by the 2nd defendant as stakeholder, had not been released to him. What surprised me was why he raised this issue, when as at 23 September 1997, he had yet to comply with cl. 7 of the SPA and cl. 3 of the PGA, viz., he had yet to deliver the profit guarantee in the form as stated therein. After all, he was a director and shareholder of FTT throughout the said three financial years
e and was managing FTT until 1 May 1997 and as such, would have been aware as to whether FTT could meet the guarantee that he personally gave when he sold the said shares to FTT.

The minutes of the annual general meeting of FTT held on 30 September 1997
f showed that the 1st defendant, who was still a director and shareholder then, did not attend the meeting. Goh Joon Hai (SD3), his proxy, was in attendance. It was resolved at that annual general meeting that the audited accounts together with the reports of the directors and auditors for year ended 31 March 1997 be approved and adopted with 250,000 votes in favour and 50,000 votes against.

g In his evidence SP1, an auditor with Messrs T.H. Liew & Gan, stated that he was satisfied with the provision for doubtful debts amounting to RM1,096,789 in the accounts for the year ended 31 March 1997 on the basis that the debts were long outstanding. He was of the view that it would be right to treat those
h debts as doubtful debts to be written off. In cross-examination, when asked by counsel for the 1st defendant as to why no provisions were made for doubtful debts for the years ended 1995 and 1996, SP1 answered as follows:

i

If I may recall normally during the process of our audits, we did ask the Board of Directors and question the recoverability of those debts and they had assured us that the steps had been taken to recover them in 1995 and 1996. I remember that a letter came from the Board telling us that the company will try to recover and this question was posed by us for the three (3) consecutive years and finally the Board agreed to make a provision in the accounts in 1997.

*a**b*

On the meaning of the word “profit”, it was SP1’s opinion that it meant income minus expenses equals profit. On the meaning of the words “pre-tax profit”, it was his professional opinion that it meant “profits earned before taxation” and that it generally meant “the income minus expenses equals profit before provision for tax”.

c

In relation to the shortfall for the year ended 1995, SP5, whose designation is executive director, CEO Secretariat Group Internal Audit & Business System, FACB Bhd, explained how profit before tax was calculated and pro-rated for that financial year due to the change in FTT’s financial year. He said:

d

The audited accounts in the first financial period, ie, the period ending 31/3/95, spans over 15 months, ie, from 1/1/94 to 31/3/95. So the audited PBT during the 15 months is as per the page, ie, RM1,521,496 but it does not coincide exactly with the profit guarantee commencement date, which is 1/4/94. So, to coincide with the profit guarantee period the audited PBT has been pro-rated over a 12 month period. This is in the second block, to arrive at a figure of RM1,217,197. This is the pro-rated figure of RM1,521,496. This is to coincide with the profit guarantee period.

e

The second financial period of the profit guarantee did not host any complications because it is the full financial year of 12 months starting from 1/4/95 to 31/3/96, to arrive at a figure of RM768,411. In the next financial period also did not host any complications as it is for a full 12 months period from 1/4/96 to 31/3/97, to give a figure of RM566.875.

f

The last column is the total column. It aggregates columns 2, 3 and 4 making a total of RM2,552,483. The profit guarantee figures were based on the profit guarantee agreement.

g

(D.4 identified)

This is the agreement I was referring to. I am familiar with D.4. Based on the profit guarantee agreement the vendor, the 1st defendant, is to deliver an aggregate profit of RM5,040,000 over the profit guarantee period; ie, delivered to the company, ie, FTT.

*h**i*

- a** (Page 61 in Lampiran 'D' referred)
- This is the provision I am referring to. The figure of RM5,040,000 was spread out over the 3 financial periods, ie, 31/3/95, 31/3/96 and 31/3/97. So, if we look at the "total" column, the total audited PBT figure is RM2,552,483. The total profit guarantee period is RM5,040,000. So when the total audited PBT figures of RM2,552,483 is compared with the profit guarantee figure of RM5,040,000 this arrive at a shortfall of RM2,487,517, ie, the third line.
- b**
- The figure RM1,680,000 under the profit guarantee is the figure of 5,040,000 divided by 3. The figure of RM1,741,262 represents 70% of the above profit guarantee shortfall. The figure is 70% because FACB Bhd, the plaintiff, bought over 70% equity from the 1st defendant, ie, 70% of the shares of FTT from the 1st defendant.
- c**
- The next 2 figures is basically the administration on the proposed collection. The figure of RM1,680,000 is the stakeholder sum held by the 2nd defendant. I am aware they are holding it. Based on the correspondence it is no more with the 2nd defendant. It is now in the hands of the 3rd defendant.
- d**
- The last figure of RM61,262 is the difference between RM1,741,262- and RM1,680,000- . This balance is to be recovered from the vendor, i.e. the 1st defendant."
- e**
- I have perused through the above calculations and I am satisfied with the explanation put forth by SP5. When the plaintiff became the owner of the said shares, in law, the undivided profits form an integral part of the shares to which they appertain (see Carron Co. V Hunter (1868) G.M. (H.L.) 106). The 1st defendant cannot now complain that it was wrong to pro-rate the profit period that way. There is no basis for him to complain. He was a party to the accounts and there was nothing to show he raised any objection, at the outset, to the accounts with the profit guarantee in mind.
- f**
- In his evidence, the 1st defendant said that FTT was incorporated in 1979 and it was involved in the travel business. He was managing director of FTT from 1979 until 9 May 1997. In relation to the words "profit earned", he said that in the travel business, it meant "the income made immediately. He then explained further as follows:
- g**
- When we sell an air-ticket, either we deal with cash or credit, and the income is considered immediately earned. Income is immediately earned when they pay by cash. Purchase on credit is also considered immediate income.
- h**
- In relation to the words "profit to be earned", he said the words "to be earned" meant the income comes later. He then forwarded the following explanation:
- i**

By income, I mean the full price, eg, if a passenger book a tour to China, the cost price may be RM5,000. They will only pay a deposit of maybe RM100, but they will not travel on that day but travel three months later or six months later. So the income we cannot consider that day the actual profit yet as they only pay us a deposit. We only recognise the amount of deposit.

a

With due respect to the 1st defendant, I cannot fathom his contention that the words “profit earned” in the travel business meant “the income made immediately” and that purchase on credit was also considered “immediate income”. He has not shown any basis for saying so but insist that, from his experience, this was how business was done in the travel industry. He also said he did not agree with the use of the audited accounts to determine profit under the profit guarantee agreement but yet agreed that Messrs T.H. Liew & Gan were the independent auditors of FTT and that there was nothing wrong with the audited accounts for the said three financial years.

*b**c*

Goh Joon Hai (SD3), a chartered accountant with Messrs Moores Rowland, who was called by the 1st defendant to give “expert evidence”, said he had no business relationship with the 1st defendant or FTT and had no financial interest arising from this case. For the purpose of the instant suit, he prepared a “report” entitled “Lapuran Pakar Defendan Pertama” (exh. D63), wherein he stated he had been “briefed on the dispute pertaining to the determination/calculation of profit for the purpose of the profit guarantee agreement”. He had studied the audited accounts for the said three financial years and in his opinion the words “profit for the year” as stated in the audited accounts was the same as “profit earned”. However the words “profit for the year” stated in the audited accounts did not include “profit to be earned”. His “report” on this point, reads:

*d**e**f*

28. “[Profit] to be earned” is not permitted under the approved accounting standards and is therefore excluded from Audited Accounts done for the purposes of the Companies Act.

29. The term “[profit] to be earned” is not part of approved accounting standards, [see: IAS 1]”

g

In his evidence, he said:

The term “profit to be earned” is not permissible for inclusion in the audited accounts of any company in Malaysia. Indeed, it was only possible for profit to be earned to be included in the profit of a company shown in the income statement forming part of the accounts. This is clearly set out in IAS 1 (international accounting standards) at that time.

*h**i*

- a* Upon perusing the evidence before me and the submissions canvassed by the parties, it is my finding that the determination of whether FTT was able to achieve the total aggregated pre-tax profit for the said three financial years would solely depend on the audited accounts. These accounts were audited in accordance with the approved accounting standards and the 9th Schedule of the Act. The evidence clearly showed that FTT failed to achieve the total aggregated pre-tax profit of RM5,040,000 for the said three financial years. It is also my finding that the shortfall to be recovered by the plaintiff is RM1,741,262 as claimed by the plaintiff against the defendants. I cannot fathom the contention of the 1st defendant that the plaintiff was not entitled to determine what was the pre-tax profit of FTT for the profit guarantee by employing the audited accounts for the said three financial years. It was not disputed by all parties that Messrs T.H. Liew & Can were independent auditors. Section 167(1) of the Act read as follows:
- b*
- c*
- d* Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.
- e* Both the plaintiff and the 1st defendant agreed that the accounts for the said three financial years were properly audited and they had no quarrel with that. It was also not disputed that the pre-tax profit of FTT were clearly reflected in the audited accounts for the said three financial years. The 1st defendant himself was a signatory to the accounts for years ended 1995 and 1996 and he also signed the statutory declaration required for those accounts, stating that to the best of his knowledge and belief, the accounts were correct. He also had no quarrel with the accounts for year ended 1997. His only bone of contention to the accounts for the year ended 1997 was with regards to the provision for doubtful debts amounting to RM1,096,789. The reason why this provision for doubtful debts was made was clear from the evidence adduced by the plaintiff, viz., that those debts could not be collected over quite a long period (see the evidence of SP1 and the minutes of the meeting of the board of directors held on 23 September 1997 (exh. D48)). Furthermore, I must point out here that the accounts for the said three financial years were that of FTT and not that of the plaintiff. Any complaint about *mala fide* should be brought against FTT itself in the form of an action, eg, under s. 181 of the Act if the 1st defendant felt that the affairs of FTT were being conducted in a manner oppressive to him as shareholder. He cannot utilise his unhappiness towards the provision for doubtful debts to get out of the profit guarantee under the circumstances in this suit.
- f*
- g*
- h*
- i*

The 1st defendant was a member of the board of directors of FTT and a shareholder of the same. I cannot find anything that can support his stand that it was implied in the SPA and PGA that pre-tax profit of FTT for the profit guarantee purpose could only be determined by an independent accountant specifically appointed for that purpose. I would think this stand of his only came about when he realised that he may not be able to meet the profit guarantee that he gave. After a careful perusal of the SPA and the PGA, I cannot see how such an implication can be made. There is no basis for the court to make such an implication. From my reading, the correspondence referred to by the 1st defendant, ie, exhs. D39 to D44 do not at all suggest that an agreement was reached between the plaintiff and the 1st defendant to appoint Messrs Coopers & Lybrand to determine the pre-tax profit for the profit guarantee purpose. I also cannot see how the conduct of the plaintiff as reflected in the correspondence referred to above can give rise to an estoppel. The intention of the plaintiff and the 1st defendant as parties to the SPA and the PGA can be clearly ascertained from the words used therein. I cannot see any ambiguity at all therein, for me to imply such a term into the SPA and PGA, viz., that it was implied in the SPA and PGA that pre-tax profit of FTT for the profit guarantee purpose could only be determined by an independent accountant specifically appointed for that purpose.

The 1st defendant, in line with his argument that an independent auditor will have to be appointed to determine the pre-tax profit of FTT for the said three financial years, had not illustrate whether, in law, a company incorporated under the Act can have different sets of accounts for different purposes. Section 169(1) of the Act provides the directors of a company shall lay before the company at its annual general meeting a profit and loss account for the period since the preceding account.

Section 169(4) provides the profit and loss account and the balance sheet of a company shall be duly audited before they are laid before the company at its annual general meeting. Section 169(5) provides the directors of a company shall cause to be attached to every balance sheet a report with respect to the profit or loss account of the company for the financial year and the state of the company's affairs at the end of the financial year. Section 169(6)(i) provides such report shall state, *inter alia*, whether the directors (before the profit and loss account and balance sheet were made out) took reasonable steps to ascertain what action had been taken in relation to the writing off of bad debts, and satisfied themselves that all known bad debts had been written off and adequate provision had been made for doubtful debts. What is clear is that the evidence showed FTT had fully complied with the provisions of s. 169.

- a* Counsel for the 1st defendant contended that what constitutes “profit” of a business was a subjective exercise and what was “profit” may differ depending on the purpose for which the determination was made. He even submitted, as an example, that what was profit, for the purpose of disclosure under the requirements of the Act, need not necessarily be accepted as profit for income tax purposes and that this could be seen from the notes to the audited accounts where it was stated that FTT had paid a “disproportionate taxation ... due to certain expenses being disallowed for taxation purposes”. The full text of this statement which appears in the notes to the accounts for the year ended 1995 (exh. P1) reads:
- b*
- c* The disproportionate taxation charge is due to certain expenses being disallowed for taxation purposes.
- As at 31st March 1995, the company has sufficient tax credits under Section 108 of the Income Tax Act, 1967 to frank the payment of dividends out of the entire retained profits.
- d* The same note, reproduced above, also appeared in the accounts ended 1996 and 1997 except that for the year ended 1997, wherein the additional following words appeared:
- The above is subject to the approval of the Inland Revenue Board.
- e*
- f* With due respect to counsel for the 1st defendant, the above note did not at all denote that a separate set of audited accounts would have to be prepared for the purpose of income tax, neither does it denote that what was profit for the purpose of disclosure under the requirements of the Act need not necessarily be accepted as profit for the purpose of income tax. In all the audited accounts, provisions had been made for deferred taxation. This would denote that the same profit and loss accounts would be submitted to the tax department for tax to be assessed. It is my view that the 1st defendant’s contention, that there was no reason why “pre-tax profit” for the purpose of cl. 2 of the PGA must necessarily be the same as pre-tax profit as revealed in the audited accounts, cannot stand at all. There is no basis for this contention based upon the evidence before me.
- g*
- h* In relation to this contention, SD3 stated in his evidence that the term “profit to be earned” was not permissible for inclusion in the audited accounts of any company in Malaysia and that it was only possible for profit to be earned to be included in the profit of a company shown in the income statement forming part of the accounts. He stressed that this is clearly set out in the International Accounting Standards 1. From my reading, SD3 was called as a witness to lend support to the 1st defendant’s contention that it is implied that a separate
- i*

independent audit had to be carried out on the accounts of FTT for the specific purpose of determining “profit to be earned”. Be that as it may, it must be noted here, that counsel for the plaintiff did object to the calling of SD3 as an expert witness on the basis that he attended as the 1st defendant’s proxy at the annual general meeting of FTT held on 30 September 1997 and hence could not be said to have no relationship with the 1st defendant. In his submission on the position of SD3 as an expert witness and the objection that he raised on the admissibility of his evidence, counsel for the plaintiff referred to *National Justice Compania Naviera S.A. v. Prudential Assurance Co Ltd (The “Ikarian Reefer”)* [1993] Volume 2 Lloyd’s Law Report 68 where Cresswell J said (at p. 81):

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v. Jordan* [1981] 1 WLR 246 at p. 256, per Lord Wilberforce).
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivine Ltd v. Commercial Union Assurance Co. Plc.* [1987] 1 Lloyd’s Rep. 379 at p. 386 per Mr Justice Garland and *Re J* [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

Counsel for the plaintiff also referred to *Liverpool Roman Catholic Archdiocesan Trustees Inc v. Goldberg (No. 3)* [2001] 1 WLR 2337. In that case, Evans-Lombe J was of the view that where there was a relationship between a proposed expert witness and the party calling him which a reasonable observer might think was capable of making the views of the expert unduly favourable to that party, his evidence should not be admitted however unbiased his conclusions might probably be.

At the end of the day, it is my view that SD3 did not present to the court any expert evidence. He did not provide independent assistance to the court “by way of objective unbiased opinion in relation to matters within his expertise”. He was the 1st defendant’s proxy at the annual general meeting of FTT held on 30 September 1997 and had declared at that meeting that in view of the observations and enquiries that he raised pertaining to the reports of the directors and of the auditors and the statement of accounts for the financial year ended 31 March 1997, he would not vote in favour of the resolution receiving and approving the same. In my view, such an active participation as

- a* the 1st defendant's proxy, would denote there was a relationship between him and the 1st defendant. As such, his independence, to me, is suspect. It is my finding that his evidence should not be admitted however unbiased his views might be.
- b* I also cannot fathom the claim of the 1st defendant that in the travel business, a purchase on credit is considered to be immediate income and is similar to a purchase by cash. I would have thought that in any business, a purchase on credit, if it remains unpaid, is a debt. Until it is paid, it will always remain a debt.
- c* In conclusion, it is my finding that for the purpose of cl. 7 of the SPA and cl. 2 of the PGA, "pre-tax profit earned and/or to be earned" must be construed to mean the pre-tax profit as revealed in the audited accounts of FTT for the said three financial years.
- d* **Third Issue – Whether The Plaintiff Is Entitled To The Said Sum Of RM1,680,000 Currently Held By The 3rd Defendant As Stakeholder**
- e* In their statement of claim, the plaintiff claimed from the 1st defendant the sum of RM61,262, ie, the difference between the shortfall amounting to RM1,741,262 and the said sum of RM1,680,000, viz., the security for the profit guarantee held by the 2nd defendant as stakeholder and called on the holder of the security of the guarantee for payment of the said sum of RM1,680,000. The plaintiff pointed out the 2nd defendant never denied that the said sum of RM1,680,000 was held by them as stakeholder pursuant to the terms and conditions of the PGA. As discussed earlier, the 3rd defendant is currently the stakeholder for the said sum of RM1,680,000.
- f* The plaintiff pointed out that their solicitors had called upon the security for the guarantee from the 2nd defendant but the latter failed to release the said sum of RM1,680,000. Instead, the 2nd defendant released the said sum to the 3rd defendant without the plaintiff's consent and in breach of the terms of the stakeholding. Irregardless of the unlawful release of the said sum to the 3rd defendant, it was the plaintiff's contention that the 2nd defendant was liable to the plaintiff for that sum. Since the 2nd defendant had agreed and confirmed they were holding the said sum as stakeholder pursuant to, *inter alia*, the PGA, they had a duty to keep the monies in their own hands pending the occurrence of the event which will lead to its release. The loss of the said sum to the 3rd defendant had to be borne by the 2nd defendant, since they were legally bound to pay out the monies to the plaintiff when the demand was made. In view of the 3rd defendant's admission that they are now holding the said sum of RM1,680,000 on the same terms and conditions as was held by the 2nd defendant, the 3rd defendant was now bound by, *inter alia*, cl. 3 of the PGA.
- i*

Therefore, when the plaintiff called on the security of the guarantee, ie, the said sum of RM1,680,000, the 3rd defendant have to release the said sum to the plaintiff. However, despite a demand made by the plaintiff, the 3rd defendant refused to release it to the plaintiff.

On this third issue, counsel for the 1st defendant emphasised there is a difference between the 1st defendant's obligation to guarantee the pre-tax profit in cl. 2 of the PGA (the "primary obligation"), and the obligation of the 1st defendant to provide security to meet the profit guarantee in cl. 3 of the PGA (the "secondary obligation"). In the case of the primary obligation, counsel contended that if there was any shortfall, a demand must first be made to the guarantor to pay the shortfall and a debt is then owed by the guarantor to the person calling on the guarantee. In the case of the secondary obligation, the security, whatever form it may ultimately take, was to secure the performance of the guarantor's primary obligation. If, as the plaintiff alleged, there was a variation in contract, of this secondary obligation, such that the parties had now agreed that the security should take the form of a deposit of RM1,680,000 with the 2nd defendant or the 3rd defendant as stakeholder, the money held by them is not a debt owed to the plaintiff but held by them for the benefit of both parties until the condition for its release was fulfilled. Furthermore, if the said sum of RM1,680,000, now held by the 3rd defendant, was the security for the performance of the profit guarantee as alleged by the plaintiff, a demand for the full amount of any alleged shortfall should first be made to the 1st defendant as the guarantor, followed by a demand to the alleged stakeholder to release the monies held, towards meeting the alleged shortfall. Counsel pointed out that it should be noted that a demand for the sum of RM61,262 only was made to the 1st defendant and the relief sought against the 1st defendant was for that sum only, although the plaintiff claimed that the shortfall is RM1,741,262.

In relation to this issue, counsel for the 2nd defendant contended that the plaintiff had not suffered any losses from the alleged breach of the 2nd defendant. The said sum was deposited with the 3rd defendant on 26 November 1997. Sng Eu Sun (SD3), a solicitor with the 3rd defendant, confirmed that the 3rd defendant would release the said sum to whosoever the court may order at the end of the trial, in addition to their undertaking given to the plaintiff and the 1st defendant *vide* the said letter (exh. D37). Counsel then pointed out the plaintiffs claim as against the 2nd defendant was for a sum of RM1,680,000 at the rate of 8% p.a. from issuance of writ till date of full payment and costs. It is his submission that the plaintiff's claim against the 2nd defendant was unsustainable and misconceived in law. The plaintiff had failed to establish that a sum of RM1,680,000 was due and owing to the plaintiff by the 2nd

- a* defendant. The said sum of RM1,680,000 belonged to the 1st defendant. The plaintiff had failed to lead evidence to establish the 2nd defendant's liability to the tune of RM1,680,000 to the plaintiff. The plaintiff should claim the said sum of RM1,680,000 from the 1st defendant on his alleged breach of performing the profit guarantee and not the 2nd defendant who was never a
- b* party or privy to the transaction between the plaintiff and the 1st defendant. Further, the plaintiff was seeking RM1,680,000 from the 2nd defendant and also RM1,680,000 from the 3rd defendant which comes to a total of RM3,360,000. The plaintiff was not seeking against the 2nd defendant and the 3rd defendant in the alternative but in total. If the plaintiff succeeds, it will
- c* not only be unjust enrichment but also double compensation. Clearly, this is unsustainable and misconceived at law, as at all material times the plaintiff's cause of action was against the 1st defendant for the sum of RM1,680,000 instead of RM61,262 only.

- d* Counsel argued the plaintiff had failed to establish a cause of action against the 2nd defendant, wherein the pleadings failed to establish the basis for seeking the sum of RM1,680,000 as against the 2nd defendant. The 2nd defendant should not be made liable to the plaintiff and prayed that the plaintiff's suit as against them be dismissed with costs.

- e* Counsel for the 3rd defendant pointed out that the claim against the 3rd defendant was for the following:

- (a) the stake money of RM1,680,000;
- (b) interest on the sum of RM1,680,000 at the rate of 8% p.a. from the date of the writ of summons, ie, 26 February 1998 till date of full payment;
- f* (c) costs.

- g* From the outset, it was the submission of the 3rd defendant that the 3rd defendant as stakeholder, was not obliged to pay the stake money either to the plaintiff or to the 1st defendant, until the resolution of their competing claims over the said sum. The 3rd defendant, having no claim whatsoever to the stake money save as to charges or costs, would pay to whoever the court directs. Counsel for the 3rd defendant further argued the 3rd defendant was not liable to pay interest to the plaintiff since the 3rd defendant did not wrongfully withhold the stake money from the plaintiff. Further, the 3rd defendant as stakeholder was entitled to keep the interest earned on the stake money. The 3rd defendant should also not be liable for the costs of the plaintiff as the 3rd defendant, in retaining the stake money pending the resolution of disputes between the plaintiff and the 1st defendant, was merely performing its duty as
- h* a stakeholder. No matter what the finding of the court on the competing claims
- i*

of the plaintiff and the 1st defendant over the stake money is, the 3rd defendant should be reimbursed for the costs incurred in defending the action. In other words, irrespective of whether the plaintiff or the 1st defendant loses, the loser must pay the 3rd defendant costs.

Counsel pointed out the 3rd defendant had written to the plaintiff confirming that they had taken over the stake money from the 2nd defendant and undertook to the plaintiff and the 1st defendant that they would deal with the stake money subject to the same terms and conditions under which the 2nd defendant had held the sum. The plaintiff made a demand to the 3rd defendant for the payout of the stake money on the grounds that there was a shortfall in the pre-tax profit amount guaranteed by the 1st defendant. The 3rd defendant did not comply with the demand as the plaintiff's allegation of a shortfall in the profit guarantee was disputed by the 1st defendant. The 3rd defendant emphasised that there was no evidence tendered by the plaintiff to show that the stake money had to be forwarded to the plaintiff merely on the strength of the plaintiff's own assertion that there had been a shortfall in the pre-tax profits guaranteed. It was not a term of the stakeholding that the 3rd defendant had to release the stake money to the plaintiff on the plaintiff's demand regardless of whether there was or was not, a shortfall in the pre-tax profits guaranteed.

In respect of the stake money of RM1,680,000 claimed by the plaintiff and the 1st defendant, the 3rd defendant, having no interest whatsoever in the stake money save the charges or costs was willing to pay the stake money to either one party on the court's direction and finding on the issue of profit guarantee and/or the issue of shortfall in the pre-tax profits guaranteed. Since the 3rd defendant had not breach its duty as stakeholder, it should not be made liable to pay the costs of the plaintiff or the 1st defendant in this action. Rather, having shown that the 3rd defendant had duly performed its duty as stakeholder, the 3rd defendant should be allowed costs of defending this suit against the plaintiff. The 3rd defendant as a stakeholder was entitled to keep the interest earned on the stake money.

In his reply, counsel for the plaintiff pointed out that what mattered was the fact that the plaintiff was making a claim in the total sum of RM1,741,252 as against all the defendants. Since the balance in the sum of RM1,680,000, after taking into account RM61,262, was held by the 3rd defendant as stakeholder now, the plaintiff was seeking that amount from the 3rd defendant towards satisfaction of the total sum of RM1,741,252 due to the plaintiff and claiming the difference from the 1st defendant.

a Finding Of The Court On The Third Issue

- What is clear is that the plaintiffs claim was for the shortfall of RM1,741,252 and this was the only sum they were claiming. As against 1st defendant, they were claiming the difference between the shortfall and the sum of RM1,680,000 which is RM61,262. What was not disputed is that the balance of the shortfall,
- b** ie, the said sum of RM1,680,000 is now in the possession of the 3rd defendant. It was an agreed fact between all the parties that the 3rd defendant held that sum as stakeholder. All the parties had also agreed that the 3rd defendant would pay the said sum of RM1,680,000 to whichever party as directed by the court. Under such circumstances, I fail to see why the plaintiff cannot claim the said
- c** sum from the 3rd defendant. The problem arose when the 1st defendant discharged the 2nd defendant sometime in 1998, which was after the end of the said three financial years. By letter dated 9 January 1998, the 3rd defendant informed the plaintiff's solicitors that the 2nd defendant, on the instructions of the 1st defendant, had forwarded the said sum of RM1,680,000 to their
- d** goodselves. In the same letter, the 3rd defendant undertook "to deal with the said sum subject to the same terms and conditions" under which the 2nd defendant held that sum, viz., carrying out the same duties and responsibilities of the 2nd defendant as if they were still retained. What was that responsibility? This can be gleaned from the series of correspondence discussed earlier. In exh.
- e** P13, the plaintiff's solicitors informed the 2nd defendant that the plaintiff had agreed to accept as security the said sum of RM1,680,000, remitted to their goodselves, to be placed by them in a fixed deposit account, instead of the letter of credit or bank guarantee pursuant to cl. 3.1. of the SPA, to be called on demand by the plaintiff pursuant to the terms and conditions contained in the PGA. The 2nd defendant did not forward that sum of RM1,680,000 to the
- f** plaintiff's solicitors. In exh. P17, the plaintiff's solicitors referred to the outcome of a meeting between the parties at the office of FTT and confirmed, as per discussion, that the 1st defendant was to furnish a bank guarantee for the sum of RM1,680,000 per annum for each of the said three financial years by the end of July 1994 and reminded the 2nd defendant that "you are to continue to
- g** hold as stakeholder the sum of RM1,680,000 currently held by you and only to release the said sum directly to your client's bank to secure the said bank guarantee in return". As discussed earlier, the bank guarantee never materialised. As such, can the 2nd defendant and now, the 3rd defendant refuse to forward the said sum of RM1,680,000 when requested by the plaintiff?
- h** The 2nd defendant, having released the said sum to the 3rd defendant without the agreement or consent of the plaintiff, has now taken a different stand on their responsibility as stakeholder. It was their contention that they had done nothing wrong in releasing the said sum of RM1,680,000 to the 3rd defendant. This leads us to the question as to what, in essence, is a stakeholding. This
- i**

question was answered in *Toh Theam Hock v. Kemajuan Perwira Management Corporation Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 by Hashim Yeop A Sani SCJ (as he then was). He said:

What is in essence stakeholding? The word “stake” is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrel v. Finch* [1977] AC 278 who repeated what was said in *Maloney v. Hardy* [1970] 216 EG 1582:

The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. ...

In *Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrel v. Finch* [1977] AC 728. He said:

If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit “as stakeholder”, he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of Property of Reed* ([1967] 2 All ER 1286 at 1289), per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v. Hoggart* ([1830] 1 B & Ad 577). If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v. Kingsman* ([1818] 1 B & Ad 683) and *Hampden v. Walsh* ([1876] 1 QBD 189). He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

- a* Pennycuick VC. In *Potters v. Loppert* at page 661 considered the law in relation to contract deposits. Where money is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid
- b* to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.
- c* According to *Osborn's Concise Law Dictionary* (8th ed.), a stakeholder is:
- A person with whom money or property (in which he himself claims no interest) is deposited to abide an event, eg, pending the decision of a bet or wager. The term is commonly used in relation to a contract for the sale of land where deposit monies are held by the purchaser's solicitors.
- d* In the light of the above, the situation in the instant case can be summarised as follows:
- e* (i) the 2nd defendant was to hold as stakeholder the said sum of RM1,680,000 and to release the said sum directly to the 1st defendant when the latter furnished the bank guarantee for the sum of RM1,680,000 per annum for each of the three said financial years by the end of July 1994;
- f* (ii) pending the furnishing of the said bank guarantee, the 2nd defendant may not part with the said sum of RM1,680,000 to either the plaintiff nor the 1st defendant, without the consent of the other;
- g* (iii) the said bank guarantee never materialised; the 2nd defendant did not part with the said sum of RM1,680,000 to either party but released it to the 3rd defendant on the platform that they had been discharged as solicitors by the 1st defendant;
- h* (iv) if the plaintiff was now entitled to the return of the said sum of RM1,680,000, they must sue the 2nd defendant and/or the 3rd defendant since the 3rd defendant, rightly or wrongly, was now in possession of the monies as the stakeholder;
- i* (v) the plaintiff cannot sue the 1st defendant for the said sum of RM1,680,000 as the latter had never received the same or become entitled to it since the furnishing of the bank guarantee never materialised.

That being the situation, I see no reason why the plaintiff cannot sue the 1st defendant for the sum of RM61,262, that being the difference between the shortfall sum of RM1,741.262 and sue the 3rd defendant for the said sum of RM1,680,000 now held by them. The plaintiff was clearly in a position to draw on the said sum since no bank guarantee was ever furnished by the 1st defendant to cover the difference between the shortfall sum of RM1,741,262 and the sum of RM61,262 which they are claiming from the 1st defendant. The said sum of RM1,680,000 was the security for the profit guarantee, as conceded by the 1st defendant, pending the furnishing of a bank guarantee. The said sum was never received by the 1st defendant and he was never at any time entitled to receive the same until he furnished the bank guarantee. He never did, and that being the case, I cannot see how his counterclaim for a declaration that he is entitled to the said sum of RM1,680,000 can stand at all. That money was originally part of the balance of the purchase price and he had agreed that it be appropriated as security pending the furnishing of a bank guarantee by him, pursuant to the terms of the SPA and PGA. Having failed to fulfil that, he now wants the said sum although it is clear that he is not entitled to it.

The plaintiff had alleged that the 2nd defendant has breached its stakeholding duties by releasing the said sum to the 3rd defendant. However, there is no claim or prayer for damages for that breach. The facts seem to denote that the 2nd defendant breached its stakeholding duties when it released the said sum to the 3rd defendant without first obtaining the consent of the plaintiff. Be that as it may, the plaintiff had not made an issue out of this by claiming damages and as such, I am of the view that this is a non-issue. Further, as the said sum is now no longer with the 2nd defendant, I would think that the plaintiff cannot sue the 2nd defendant for the same. Notwithstanding that, I cannot see why the plaintiff cannot claim interest earned on the said sum from the 2nd defendant during their tenure as stakeholder of the same.

I am also of the view that the contention of the 3rd defendant that they are entitled to keep the interest is a non-issue. They have not pleaded this. Further, I am of the view they were not in a position to accept the said sum of RM1,680,000 as stakeholder without first obtaining the consent of the plaintiff but did so, on the basis that they had been appointed as solicitors for the 1st defendant in place of the 2nd defendant. Be that as it may, I would think that since the 3rd defendant had agreed to pay the said sum to whichever party as directed by the court, they would have to account for the interest earned from the date they deposited the said sum in the financial institution concerned until the same is released to the party who is entitled to receive it. Whatever reimbursement they claim they are entitled to, is a matter between them and

a the 1st defendant and has no bearing on this suit. In conclusion, it is my finding that the plaintiff is entitled to the said sum of RM1,680,000 as claimed, now held by the 3rd defendant as stakeholder.

b In the premises, I conclude that the plaintiff has proved its case that there was a shortfall amounting to RM1,741,262 between the pre-tax profit of FTT guaranteed by the 1st defendant and the actual pre-tax profit of FTT for the said three financial years. That being the case, it is my judgment that:

c (a) as against the 1st defendant, the plaintiff is entitled to the sum of RM61,262 claimed, being the difference between the shortfall amounting to RM1,741,262 and the said sum of RM1,680,000 now held by the 3rd defendant as stakeholder, with interest at the rate of 8% per annum from the date of filing of the writ of summons until its realization and costs which is to be taxed;

d (b) as against the 2nd defendant, I would order that they pay to the plaintiff all interest earned on the said sum of RM1,680,000 during the period when the same was held by them as stakeholder until its release to the 3rd defendant; I would also order that the 2nd defendant bear their own costs of defending this action;

e (c) as against the 3rd defendant, I would order them to release the said sum of RM1,680,000 to the plaintiff within 14 days from the date this judgment is delivered and I would also order that they pay to the plaintiff all interest earned on the said sum during the period when the same was held by them until its release to the plaintiff; I would also order that the 3rd defendant bear their own costs of defending this action;

f (d) the 1st defendant's counter-claim against the plaintiff is dismissed with costs to be taxed.

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